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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BENJAMIN McFARLAND ..... *Petitioner*

v.

STATE OF ARKANSAS ..... *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

PETITION FOR WRIT OF CERTIORARI

CHRISTOPHER O'HARA CARTER
Marion County Public Defender
P. O. Box 804
Yellville, Arkansas 7287
(870) 449-6273
Attorney for Petitioner

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QUESTION PRESENTED

The question presented is whether the trial court should have allowed into evidence the confession of a 17-year-old charged with capital murder when the confession was obtained by Arkansas authority in the State of Utah after the defendant had been arrested and held in juvenile detention for nine days by Utah authorities without an attorney appointed or a court appearance, in violation of this Court's decision in *Riverside v. McLaughlin*, 500 U.S. 44 (1991).

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OFFICIAL CITATION

McFarland v. State, __ Ark. __, 989 S.W.2d 889 (1999)

JURISDICTION

The date on which the highest state court decided this case was May 6, 1999. A copy of that decision appears in the Appendix.

An extension of time to file a petition for certiorari was granted to and including September 3, 1999 on August 2, 1999 in application number A-112.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On Friday, August 16, 1996, Christopher Epps and his girlfriend, Candace Campbell, returned from his father's residence in Hot Springs and met up with a number of friends they met earlier in the summer, which included the appellant. That weekend, the appellant, Christopher Epps, Candace Campbell and Jason McGehee stayed at a residence at 1123 North Spring in Harrison, Boone County, and over the course of a weekend, a number of people came and went. The residents lived off forged checks that were in the possession of Jason McGehee but cashed by various individuals. On Monday, August 19, 1996, the victim, 15-year-old John Melbourne Jr., arrive at the residence and was given a check by Jason McGehee on an account of Aileene Padgett. McGehee took that check and tried to cash it at Cooper Shoes, which is on the square in Harrison. The check was not correctly filled out, and Melbourne left and returned a short time later with Anthony Page, and he was able to cash the check and purchase a pair of shoes. John Melbourne took the money and gave it to Jason McGehee and returned to the courthouse square. Rick Harness, the manager of Cooper Shoes, was suspicious and called the bank and discovered the check had been reported stolen. He made a report to the Harrison Police Department, and while he was being interviewed by Patrolman Mark Rupp, he noticed John Melbourne and Anthony Page across the street at the courthouse square, and they were picked up and taken to the City of Harrison Police Department for questioning. Upon questioning by detectives, John Melbourne told the officers about the checks and other stolen property

that could be located in and around the residence at 1123 North Spring Street. Members of the Harrison Police Department went to the residence and knocked, but no one came to the door as the appellant, Candace Campbell, Jason McGehee and Christopher Epps all were hiding in a back bathroom. From their vantage point, the persons in the house were able to observe the officers find certain items of stolen property, and it was discussed among themselves that John Melbourne must have turned them in.

Later that day, Charla Bright, the next-door neighbor, came over and asked Ben McFarland and Christopher Epps to go with her to find some "weed." Near the hospital, they saw John Melbourne and told him that Jason wanted to see him, and John Melbourne arrived at the residence shortly thereafter. Melbourne had previously been released by the Harrison Police Department to the custody of his father and had been given an evidence receipt for the shoes that were taken from him. He left his father's residence without permission and arrived at the residence at 1123 North Spring Street in the early evening. Upon arriving at the residence, he was hit by Christopher Epps and accosted by Jason McGehee wanting to know why he turned them in to the police. John Melbourne denied turning anyone in and, as a result, was beaten off and on for the next one to two hours by Jason McGehee, Christopher Epps Candace Campbell and the appellant. The neighbor, Charla Bright, came to the door three times and observed the beating and indicated that Melbourne had also taken $75 from her, and Christopher Epps hit him twice for that. Charla Bright testified that, later, Ben McFarland and Christo-

pher Epps again went with her to look for drugs, and the appellant ran into contact with Tony Page and told him that John Melbourne had turned them in and was getting the ass beating of his life. When McFarland and Epps returned, Jason McGehee had made arrangements with Robert Diemert, the actual renter of the house at 1123 North Spring, to leave immediately and head to Utah, where Jason McGehee had relatives.

John Melbourne was bound, and he, the appellant, Christopher Epps, Jason McGehee, Candace Campbell and Robert Diemert all piled into Diemert's 1980 Mercury Bobcat and drove to a residence just east of Omaha, Arkansas which had been formerly rented by Jason McGehee's uncle. Upon arriving at the residence, the beating resumed by Candace Campbell, Jason McGehee, the appellant and Christopher Epps, and to a lesser extent, Robert Diemert participated. Testimony at trial conflicted as to who participated in which beatings, but John Melbourne was beaten by various persons with an ax handle; he was burned on the testicles with candle wax by Candace Campbell, and Jason McGehee picked up a window fan and hit him with it because they were convinced John Melbourne was a snitch. At one point, John Melbourne got up and tried to run, and he was brought back by Jason McGehee and the appellant.

While Candace Campbell and Robert Diemert waited at the car, the other defendants, including the appellant, took John Melbourne over the hill, and he was never seen alive again. At that point, the five remaining individuals headed off to Utah in the 1980 Mercury Bobcat, although

they left Christopher Epps at a store near Tulsa because he was obnoxious. The remaining four made it to Utah and broke into a home belonging to Jason McGehee's aunt and took a checkbook and a vehicle. During the course of the burglary, Robert Diemert left the group and returned to Arkansas. On August 27, 1996, the appellant, Candace Campbell and Jason McGehee were picked up in Provo, Utah, and Candace Campbell and Ben McFarland were placed in a juvenile detention facility, and Jason McGehee was placed in an adult facility.

On August 30, 1996, Candace Campbell talked to her mother about the events in Arkansas and, based on that, she was called by the Harrison Police Department, and she told them that she believed John Melbourne had been killed and described the general area where the body could be found. On September 3, 1996, the body was found about 150 yards from the residence in a remote area near Omaha. On Thursday, September 5, 1996, investigators from the Arkansas State Police, Harrison Police Department and Boone County Sheriff's Office arrived in Provo, Utah to interview the three suspects. At 1:30 p.m., they started to interview Ben McFarland, and when the police indicated they knew more than he was letting on, he requested to speak to an attorney. The officers then left the juvenile detention facility and, while they were at the adult facility, received word that Ben McFarland wanted to speak to them again. Detective Marc Arnold of the Harrison Police Department returned to the juvenile facility and discovered that, in the interim, Ben McFarland had called his mother in Arkansas but did not explain to her the predica-

ment he was in. At 4 p.m. on September 5, 1996, a second interview began, and the appellant admitted his involvement in the beating and death of John Melbourne and, in fact, admitted he was the one choking John Melbourne when the life went out of him. The appellant moved to suppress his statement on the basis that he had been held in Utah for nine days without an attorney appointed for him and without a court appearance, after he was denied his right to counsel, and his statement was taken in violation of *Miranda.* In addition, the appellant contends that, because he was less than 18 at the time of the offense, the International Covenant of Civil Rights prevented the state from seeking the death penalty against him. Those motions were denied by the court, and the appellant was convicted of capital murder and kidnapping and sentenced to concurrent life terms without the possibility of parole. The conviction was affirmed by the Supreme Court of Arkansas on May 6, 1999 in *McFarland v. State,* __ Ark. __, 989 S.W.2d 889 (1999).

REASONS FOR GRANTING THE PETITION

As the facts point out, the petitioner was arrested in the state of Utah and placed in Utah detention based on Utah charges after the murder had occurred, but before the murder was discovered by authorities. The petitioner was held in juvenile detention in Utah for nine days before his interview with Arkansas authorities, in which he initially requested an attorney, but after talking to his mother in Arkansas by telephone, he asked the officers to come back and, after being read his *Miranda* rights, admitted involvement in the murder of John Melbourne Jr.

The interviews were conducted by officers from the Harrison (Arkansas) Police Department and the Boone County (Arkansas) Sheriff's Office, and they acknowledge that, when the petitioner requested an attorney, they stopped the interview and further admitted they had no idea where to obtain an attorney for petitioner in the state of Utah. This fact is significant as far as this petition is concerned because, if Utah had followed the dictates of this Court in *County of Riverside v. McLaughlin,* 500 U.S. 44 (1991), the petitioner would have had an appearance before a judge and, almost certainly, had an attorney available to him to advise him of his rights and the propriety or impropriety of making a statement which would potentially lead to the death penalty.

As the Supreme Court of Arkansas opinion reflects, and as the petitioner stated in oral argument before the Supreme Court of Arkansas, the Arkansas police and sheriff's officers followed Arkansas law and procedure, and they obtained a

confession from the petitioner. It is the petitioner's position, however, that both Arkansas and Utah are covered by the Fourth and Fourteenth Amendments to the United States Constitution, and if Utah did not follow the Constitution and timely appoint an attorney to represent the petitioner and did not act promptly in getting the petitioner before a court, then Arkansas should not be allowed to take advantage of this violation and obtain a confession after the petitioner had originally asked for an attorney.

This Court has consistently held that custodial confessions are deemed involuntary without procedural safeguards. *See, Miranda v. Arizona,* 384 U.S. 436 (1966).

The petitioner would point out that Utah authorities were aware at least 48 hours in advance of the interview that the petitioner was a possible suspect in a murder case in Arkansas. Yet they still left him in detention and did not have him appear in front of a judge, appoint an attorney or even notify his mother from the date of the arrest until he called her between the first and second interviews with Arkansas authorities.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BENJAMIN MCFARLAND

By CHRISTOPHER O'HARA CARTER
Marion County Public Defender
P. O. Box 804
Yellville, Arkansas 72687
(870) 449-6273

APPENDIX A

Opinion of the Supreme Court of Arkansas Delivered May 6, 1999

ROBERT L. BROWN, Justice

The appellant, Benjamin McFarland, was convicted of capital murder and kidnapping and sentenced to life imprisonment without parole and life imprisonment, respectively. In the summer of 1996, McFarland (age 17) was part of a group of friends who stayed together at a house at 1123 North Spring Street in Harrison. The residence was rented by Robert Diemert (age 27), who had lost his job and allowed Jason McGehee (age 21), the leader of the group, to take over the premises. The members of the group, who were in their teens and early twenties, lived by cashing stolen and forged checks. They included McFarland, McGehee, Christopher Epps (age 19), Candace Campbell (age 17), Anthony Page and John Melbourne Jr. (age 15).

On August 19, 1996, McGehee sent Melbourne into Harrison to cash a stolen check. Melbourne went to Cooper Shoes, which is on the square, and was told that the check was not correctly filled out. Melbourne returned later that day with Anthony Page and was able to cash the check and purchase a pair of shoes. The manager of the store was suspicious of the two and called the bank. When he discovered the check was stolen, he called the Harrison Police Department. While the police officers were at the store, they saw Melbourne across the street and stopped him for questioning. Melbourne told the officers about

the stolen checks and other stolen property that could be found at or near the house on North Spring Street. He was released into his father's custody.

The police officers went to the residence. McGehee, Campbell, Epps and McFarland saw them and hid in the back of the house. They were able, however, to observe the officers as they searched and found the stolen property and concluded that Melbourne, who had not returned, must have "snitched" to the police officers. Later that day, McFarland and Epps saw Melbourne in town and asked him to stop by the house. He did and was immediately set upon by McGehee and Epps. He was beaten by the group, including McFarland, for the next one and one-half to two hours. Later that evening, McGehee decided they all should go to Utah, where he had some relatives—presumably in order to avoid arrest for the stolen and forged checks. Melbourne's hands were bound, and he, along with Epps, McFarland, McGehee, Campbell and Diemert, left for Utah in Diemert's car.

Campbell and Diemert testified at McFarland's trial that during the trip someone asked Melbourne how it felt to know he was going to die. Campbell testified that it was either Epps or McFarland while Diemert testified it was McGehee. The group traveled to an abandoned house in Omaha, Arkansas. They entered the house and again began to beat Melbourne. The testimony established that everyone there participated in the beating at varying levels. At one point, Melbourne tried to escape but only made it to the kitchen before he was caught by McGehee, Epps and

McFarland. There was testimony that McGehee hit Melbourne's head with a box fan and that others hit him with sticks and burned him with a candle wick. This beating lasted approximately an hour. After the beating, McGehee, Epps and McFarland took Melbourne out behind the house and walked down a trail into a wooded area. Campbell and Diemert stayed in Diemert's car.

Epps, McFarland and McGehee took turns strangling Melbourne until he died. In a statement made to Arkansas authorities, McFarland admitted that he was the one strangling Melbourne with an orange cord when he expired. The group then drove to Utah. On the way, they left Epps in Tulsa because the was "whining," according to McFarland. When they arrived in Utah, they burglarized McGehee's aunt's house in Elmo, taking a checkbook and her automobile. Diemert left the group while they were burglarizing the house and returned to Arkansas in his car. On August 27, 1996, the remaining three, McGehee, Campbell and McFarland, were arrested in Provo, Utah. They had used a stolen check to pay for a hotel room and were driving the stolen vehicle. McGehee was placed in an adult facility, and Campbell and McFarland were taken to a juvenile detention facility.

On August 30, 1996, Candace Campbell talked with her mother and told her about Melbourne's murder. Later that day, Campbell called the Harrison Police Department and told the police officers where to find the body and the circumstances surrounding the death. On the evening of September 3, 1996, the police officers found the body approximately 150 yards behind the

abandoned house in Omaha. On September 5, 1996, Arkansas law enforcement officers, including Detective Marc Arnold of the Harrison Police Department, flew to Provo, Utah to interview Campbell and McFarland. After speaking with Campbell, they interviewed McFarland at 1:30 p.m. They initially read him his *Miranda* rights, and McFarland executed a standard waiver. He further said he understood his *Miranda* rights. When the police officers began questioning him about the Melbourne case, McFarland asked if he could speak with an attorney. The police officers ceased their questioning but asked him if he had contacted his family and who his attorney was. McFarland answered that he had spoken with his family but that he did not have an attorney.

Later that same day, at approximately 4 p.m., one of the jailer staff contacted Detective Marc Arnold and told him that McFarland wanted to speak with him again. Detective Arnold, accompanied by an officer with the Provo Police Department, first verified that McFarland wanted to initiate the interview. He read him his *Miranda* rights a second time, and McFarland again executed a waiver form. Detective Arnold testified that McFarland told him he had spoken with his mother, who urged him to tell the truth. In response to McFarland's inquiry, the detective told him he was probably looking at a capital murder charge. McFarland admitted to beating Melbourne because he "snitched" and said that he was strangling Melbourne when he died:

> So three of us went out there and next thing I knew was just everybody was getting enraged. . . . Then we

> went out there and just I don't know the mentality switched for all three of us. One thing led to another and he was strangled. . . . Who actually did it? Well all three of us strangled him at separate times. Are you saying when he finally lost his life, who was strangling him? Me.

McFarland was charged with capital murder and kidnapping and extradited to Arkansas. Before trial, McFarland's counsel moved to suppress the statement, arguing that McFarland was held for six days in Utah before being brought before a judge (he argues nine days on appeal) and that but for the delay, McFarland might have been afforded counsel before being interviewed by the Arkansas authorities. McFarland was found guilty on both counts and sentenced to life without parole for the capital murder charge and life in prison for kidnapping.

I. Sufficiency of the Evidence

McFarland's first argument is that the trial court erred in refusing to direct a verdict in his favor on both the capital murder and kidnapping charges due to the absence of substantial evidence. He contends that a directed verdict was proper for the capital murder count because the State failed to prove that he acted with a premeditated and deliberate purpose in the murder. He also claims that with regard to the kidnapping charge, the State did not prove that Melbourne was restrained involuntarily.

Motions for directed verdict are treated as challenges to the sufficiency of the evidence. *See Russey v. State,* 336 Ark. 401, 985 S.W.2d 316 (1999); *Johnson v. State,* 326 Ark. 3, 929 S.W.2d 707 (1996). When reviewing the sufficiency of the evidence on appeal, this court does not reweigh the evidence but determines instead whether the evidence supporting the verdict is substantial. *See Davis v. State,* 325 Ark. 96, 925 S.W.2d 768 (1996). Substantial evidence is defined as direct or circumstantial evidence that is forceful enough to compel a conclusion and goes beyond mere speculation or conjecture. *See Bailey v. State,* 334 Ark. 43, 972 S.W.2d 239 (1998). In determining whether there is substantial evidence, this court reviews the evidence in the light most favorable to the State. *See Dixon v. State,* 310 Ark. 460, 839 S.W.2d 173 (1992). Only evidence supporting the verdict is considered. *See Moore v. State,* 315 Ark. 131, 864 S.W.2d 863 (1993).

A person commits capital murder if "[w]ith the premeditated and deliberated purpose of causing the death of another person," he causes the death of any person. *See* Ark. Code Ann. §5-10-101(a)(4) (Repl. 1997). McFarland urges that the State failed to show that he acted with a premeditated and deliberate purpose and, thus, a directed verdict in his favor was proper. He emphasizes that Jason McGehee led the group and decided what would be done.

Because intent can rarely be proved by direct evidence, a jury may infer premeditation and deliberation from circumstantial evidence such as the type and character of the weapon used, the manner in which the weapon was used, the na-

ture, extent and location of the wounds inflicted and the conduct of the accused. *See Lever v. State,* 333 Ark. 377, 971 S.W.2d 762 (1998); *Lloyd v. State,* 332 Ark. 1, 962 S.W.2d 365 (1998). The necessary premeditation and deliberation is not required to exist for a particular length of time and may be formed in an instant. *See Lever v. State, supra; Key v. State,* 325 Ark. 73, 923 S.W.2d 865 (1996).

Contrary to McFarland's assertion, there is sufficient evidence of McFarland's premeditation and deliberation. On the way to Omaha, the question was asked Melbourne, either by McFarland or in McFarland's presence: How does it feel to know you're going to die? His death was the culmination of two prolonged beatings and torture. McGehee, Epps and McFarland led Melbourne out to the back of the house in Omaha and were there for forty-five minutes, taking turns strangling him. An orange cord as used by McFarland to finally kill Melbourne. One can infer premeditation from the method of death itself—strangulation. *See, e.g., Mulkey v. State,* 330 Ark. 113, 952 S.W.2d 149 (1997) (jury could infer the defendant's purpose in causing the victim's death from the blunt-force injuries to the head and evidence of strangulation.) Additionally, McFarland was asked when giving his statement: "When you took him out there did you think you might wind up killing him?" He answered: "The thought had crossed my mind a couple of times that that's what might happen." He also stated that the first time he thought about it was on the way to Omaha. McFarland said that the three participants had become enraged and that he was angry because Melbourne had implicated him in a crime

he had not committed. Robert Diemert testified that the three young men came back from the woods laughing. In sum, there is substantial evidence of Melbourne's [sic] premeditated and deliberate intent to commit capital murder.

Regarding the kidnapping, Melbourne [sic] contends that the State failed to prove that Melbourne was transported or restrained without his consent. Kidnapping requires the restraint of another:

(a) A person commits the offense of kidnapping if, without consent, he restrains another person so as to interfere substantially with his liberty for the purpose of:

. . .

(4) Inflicting physical injury upon him, or of engaging in sexual intercourse, deviate sexual activity or sexual contact with him; or

(5) Terrorizing him or another person. . . .

Ark. Code Ann. §5-11-102 (Repl. 1997).

This court has held that this statute speaks in terms of restraint and not removal. *See Lee v. State,* 326 Ark. 529, 932 S.W.2d 756 (1996). Hence, the statute reaches a greater variety of conduct because restraint can be accomplished without removal. *See Smith v. State,* 318 Ark. 142, 883 S.W.2d 837 (1994). Here, there are several different acts that constitute kidnapping—forcing Melbourne to stay in the North Spring Street house during the beating in Harrison, removing him to Omaha with hands tied and preventing him from leaving the house in Omaha. It

is true that Melbourne did come to the house on North Spring Street voluntarily, but the evidence established that his hands were bound at the house in Harrison, during the trip to Omaha and in the house at Omaha.

McFarland relies on the fact that Diemert testified that he thought Melbourne came on the Utah trip voluntarily. Diemert, however, did not realize that his hands were bound until the group got out of the car in Omaha. Regardless of that testimony, Diemert did acknowledge that Melbourne was restrained and we view the evidence in favor of the State. The trial court did not err in refusing to direct a verdict on either charge.

II. Lesser Included Offense

At trial, McFarland asked the trial court to instruct the jury on first-degree felony murder, based on AMCI 1502, as follows:

> To sustain this charge, the State must prove the following things beyond a reasonable doubt:
>
> First: That Ben McFarland, acting alone or with one or more other persons, committed kidnapping, and
>
> Second: That in the course of and in furtherance of that crime, Ben McFarland or a person acting with him, caused the death of John Melbourne Jr. under circumstances manifesting extreme indifference to the value of human life.

The trial court declined to give the instruction, and McFarland asserts that this was error.

McFarland is correct that when evidence at trial warrants instructions on lesser included offenses, the instructions must be given. *See Bradford v. State,* 325 Ark. 278, 927 S.W.2d 329 (1996); *Westbrook v. State,* 265 Ark. 736, 580 S.W.2d 702 (1979). Nevertheless, in this case McFarland was charged with capital murder based on premeditation and deliberation and not capital felony murder. Purposeful first-degree murder under §5-10-102(a)(2) is a lesser-included offense of premeditated capital murder. *See Allen v. State,* 310 Ark. 384, 838 S.W.2d 346 (1992). First-degree felony murder is not. *See id.* McFarland did not request an instruction on purposeful first-degree murder. As we said in *Allen v. State:*

> Under the capital murder statute, Ark. Code Ann. §5-10-101 (Supp. 1991), there are two types of capital murder. One is the premeditated and deliberate killing of a person, and the other is the killing of a person in the course of one of several enumerated felonies. Appellant was charged only with premeditated and deliberate capital murder. This kind of premeditated capital murder charge includes the lesser charge of purposeful first degree murder. Appellant was not charged with the other kind of capital murder, often termed felony-murder.

310 Ark. at 385, 838 S.W.2d at 346. Stated simply, first-degree felony murder is not a lesser included offense of premeditated and deliberate capital murder.

Moreover, the Arkansas Constitution reserves the duty of charging an accused to the prosecutor or the grand jury. *See* Ark. Const. amend. 21 §1. McFarland was not charged with capital felony murder or first-degree felony murder. The Arkansas Constitution would be violated if the trial court, in effect, amended a criminal information by instructing the jury on an uncharged offense. *See Renfro v. State,* 331 Ark. 253, 962 S.W.2d 745 (1998). There was no abuse of discretion by the trial court in refusing to instruct the jury on first-degree felony murder.

III. Failure to Suppress the Statement

The facts leading up to McFarland's statement are these. On August 27, 1996, he was taken into custody in Utah, solely on Utah charges—hot checks, burglary and theft of a vehicle. On August 30, 1996, Arkansas authorities got a phone tip from Candace Campbell, who was in the juvenile facility in Utah, that McFarland and others were involved in Melbourne's murder. On September 3, 1996, they confirmed the murder when they found Melbourne's body in Omaha. On September 5, 1996, the Arkansas law enforcement officers flew to Utah and interviewed McFarland. As soon as he asked for an attorney, they stopped questioning him. A few hours later, McFarland initiated the questioning himself, asking if he could speak with Detective Arnold. At both interviews, he signed a valid rights form. Both inter-

views were recorded, and there is no evidence that his statements were anything but voluntary. The tape of the second interview was read to the jury at trial and contained his confession of the crime.

McFarland argues now, as he did before the trial court, that his statement should be suppressed because he was not promptly taken before a judge in Utah. He argues that at the time he was questioned, he had been confined in the juvenile facility in Utah for nine days without being brought before a judge and that because of this delay, he did not have counsel. Had he had appointed counsel, he contends that he would not have confessed to the Arkansas police officers.

In denying his suppression motion, the trial court observed that McFarland was sufficiently advised of his rights, made a knowing waiver of those rights and initiated the second interview with police officers. Furthermore, the trial court emphasized that there was nothing in the record to show when McFarland was brought before a judge on the Utah charges and what actions transpired. Without a sufficient record on this point the trial court stated that it could make no decision regarding it.

We agree with the trial court. When an accused is in custody, any statement made is presumed involuntary, and the burden is on the State to prove by a preponderance of the evidence (1) voluntariness, and (2) that the statement was knowingly and intelligently made. *Smith v. State,* 334 Ark. 190, 974 S.W.2d 427 (1998). McFarland cites his age, tenth-grade education, lack of family in Utah and emotional mental state as factors

militating against a knowing waiver of *Miranda* rights and a voluntary statement. In such cases, we look to the totality of the circumstances. *See Clay v. State,* 318 Ark. 122, 883 S.W.2d 822 (1994). In the instant case, we are convinced that McFarland, who was *Mirandized* twice, fully understood his rights and knowingly waived them. Indeed, at one point, he exercised his right to counsel. We conclude that the State met its burden. Furthermore, after asking for counsel in the first interview, McFarland initiated contact with the police officers, which led to his confession. Under these circumstances, the United States Supreme Court as well as this court have held that the confession is voluntary. *See Michigan v. Jackson,* 475 U.S. 625 (1986); *Edwards v. Arizona,* 451 U.S. 477 (1981); *Willett v. State,* 322 Ark. 613, 911 S.W.2d 937 (1995).

It is the appellant's burden to produce a record exhibiting prejudicial error. *See McGhee v. State,* 330 Ark. 38, 954 S.W.2d 206 (1997); *Edwards v. State,* 321 Ark. 610, 906 S.W.2d 310 (1995). And we will not consider an argument where the appellant presents no citation to authority, makes no convincing argument in support of his allegation of error and it is not apparent without further research that the argument is well-taken. *See Bailey v. State,* 334 Ark. 43, 972 S.W.2d 239 (1998); *Williams v. State,* 325 Ark. 432, 930 S.W.2d 297 (1996). In this case, McFarland failed to put forth any evidence that his constitutional rights were violated in Utah. Indeed, Campbell testified that she and McFarland were both taken before a judge in Utah a couple of days after their arrest. It would have been a simple matter for defense counsel to obtain some kind of

official record of his appearance, or lack thereof, before a judicial officer. Moreover, the United States Supreme Court has made it clear that it is only when there is a working arrangement or collaboration between two separate jurisdictions, whether federal and state or state and sister state, to perpetuate abuses such as delay in the appointment of counsel which led to a confession that suppression may be appropriate. *See Anderson v. United States,* 318 U.S. 350 (1943); *United States v. Rose,* 526 F.2d 745 (8th Cir. 1975), *cert. denied,* 425 U.S. 905 (1976).

The case of *Branscomb v. State,* 299 Ark. 482, 774 S.W.2d 426 (1989), is instructive on this point. In *Branscomb,* a defendant claimed there was unnecessary delay in taking him before a magistrate in Chicago, Illinois, which had an impact on his subsequent confession in Lee County. Branscomb was arrested there on September 27, 1986 and remained incarcerated until December 11, 1986, when a Lee County deputy sheriff brought him back to Arkansas. Except for the defendant's own testimony, the trial court had no information about what happened in Chicago between those dates. The trial court refused to consider the delay after his arrest in Chicago and his transportation to Arkansas, noting that it had no idea what caused the delay in Chicago. In reviewing the decision, we concluded: "We can hardly attribute it [the delay] to an attempt by the State to gain a tactical advantage over Larry [the defendant]." Similarly, in the instant case, we have no idea what happened in Utah between the time McFarland was arrested and when he was interviewed by Arkansas police officers.

Without the facts of what occurred in Utah and evidence that Arkansas authorities somehow prolonged McFarland's ability to have counsel appointed for him, we will not suppress a statement. None of that has been provided us in this case, and we affirm the trial court's decision not to suppress.

IV. International Covenant on Human and Civil Rights

McFarland also raises the novel defense that the United States has signed the International Covenant on Civil and Political Rights, which provides that the death penalty shall not be imposed on persons below age eighteen years. This argument is meritless. First, the treaty signed by the president provides that persons under eighteen *may* be sentenced to death. But even more to the point, the issue is moot. McFarland did not receive the death penalty.

An issue becomes moot if the judgment will have no practical effect on the litigant, and, therefore, the decision on the issue is advisory only. *See Stilley v. McBride,* 332 Ark. 306, 965 S.W.2d 125 (1998). Questions related to the imposition of the death penalty become moot when the death penalty is not imposed. *See Ferrell v. State,* 325 Ark. 455, 929 S.W.2d 697 (1996); *Brewer v. State,* 271 Ark. 254, 608 S.W.2d 363 (1980). Hence, we give this argument no credence.

V. Doyle *Violation*

McFarland's final argument is that the trial court erred in refusing to grant a mistrial when Captain Kyle Wolfe, an investigator with the Boone County Sheriff's Office, testified that McFarland asked for counsel during his interrogation. He argues that this violated his due process rights because the Sate used his post-arrest silence for impeachment purposes. *See Doyle v. Ohio,* 426 U.S. 610 (1976). During direct examination, this colloquy ensued:

> Prosecutor: And did you ask him if he knew—basically, if he knew what had happened to John Melbourne or anything about him in recent days?
>
> Wolfe: Yes. And he said something to the effect that he had left that morning and that's the last he had seen of him.
>
> Prosecutor: He didn't acknowledge in that, then, any knowledge of John Melbourne or anything that had happened to John?
>
> Wolfe: No, sir, he did not.
>
> Prosecutor: Essentially, that was a very short interview at that point. Is that correct?
>
> Wolfe: Yes, it was.

Prosecutor: And you all concluded that interview?

Wolfe: Yes, sir. I advised him that I didn't believe him, and he said that he wanted to see his attorney, so I just—

Prosecutor: Okay. And you stopped the interview at that point?

Wolfe: I stopped.

McFarland's counsel moved for a mistrial because of the reference to the request for counsel, and the trial court denied the motion. On cross-examination, the appellant's counsel tried to establish that McFarland had been truthful in his statement. On redirect, the prosecutor asked:

Prosecutor: At that point in the discussion, you felt he wasn't being truthful?

Wolfe: That's correct.

Prosecutor: And that's when you told him you didn't think he was being truthful with you, and that's when the conversation ended.

Wolfe: That's correct. He asked for an attorney and I told him it was his prerogative.

Prosecutor: And that ended the conversation.

Wolfe: That's correct.

McFarland's counsel renewed his mistrial motion concerning the reference to the attorney, which was again denied. No request for a curative instruction or admonition was made by defense counsel.

The State maintains in this appeal that the prosecutor had no intention of impeaching McFarland with his silence but instead wanted to establish his truthfulness because it had McFarland's confession. Furthermore, the State contends that it did not solicit the testimony from Captain Wolfe. In *Tarkington v. State,* 313 Ark. 399, 855 S.W.2d 306 (1993), we held that there was no *Doyle* violation when there was no comment or question by the prosecutor about appellant's post-arrest silence but instead there was an inadvertent reference to the defendant's silence by a witness. *See also McIntosh v. State,* 296 Ark. 167, 753 S.W.2d 273 (1988), *cert. denied,* 489 U.S. 1065 (1989). In both *Tarkington* and *McIntosh,* we relied on *Greer v. Miller,* 483 U.S. 756 (1987). In *Greer,* the prosecutor asked the defendant on cross-examination why he did not tell his story about the murder. Following an objection by defense counsel, the trial court instructed the jury to ignore the question. The Supreme Court held that the admonition essentially cured any *Doyle* problem.

Similarly, in the instant case, we view Captain Wolfe's comments as unsolicited and merely inadvertent. They were not the result of questions propounded by the prosecutor. We are also cogni-

zant of the drastic nature of a mistrial. A mistrial should only be declared when there has been an error so prejudicial that justice cannot be served by continuing the trial, or when the fundamental fairness of the trial itself has been manifestly affected. *See King v. State,* 335 Ark. 139, 983 S.W.2d 383 (1998); *Bell v. State,* 334 Ark. 285, 973 S.W.2d 806 (1998). The trial court has wide discretion in granting or denying a motion for mistrial, which will only be granted when the possible prejudice could not be remedied by an admonition to the jury. *See Bell v. State, supra.*

We are convinced that an admonition would have cured any prejudice resulting from the police officer's reference to McFarland's request for counsel. No such request was made. McFarland's counsel admitted at oral argument that the decision to rely on his mistrial motion and not seek an admonition was essentially strategic. We find no merit to this argument.

The record has been reviewed for other reversible error pursuant to Ark. Sup. Ct. R. 4-3(h), and none has been found.

Affirmed.

APPENDIX B

Mandate of the Supreme Court of Arkansas Handed Down on May 25, 1999

This criminal appeal was submitted to the Arkansas Supreme Court on the record of the Circuit Court of Boone County and briefs of the respective parties. After due consideration, it is the decision of the Court that the conviction is affirmed.

It is also ordered that the appellant shall immediately surrender to the sheriff of Boone County. If the surrender is not immediate his bond is declared forfeited and a warrant shall issue for appellant's arrest.

IN TESTIMONY, that the above is a true copy of the judgment of the Supreme Court, I, Leslie W. Steen, Clerk, set my hand and affix the seal this 25th day of May, A.D. 1999.

LESLIE W. STEEN, Clerk

APPENDIX C

Notification by William K. Suter, Clerk, Supreme Court of the United States, Extending Time for This Petition to September 3, 1999

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Thomas, who on August 3, 1999, extended the time to and including September 3, 1999.

This letter has been sent to those designated on the attached notification list.

WILLIAM K. SUTER, Clerk

By LORETTA S. RUFFIN
Assistant Clerk

Notification List

Mr. Christopher O'Hara Carter
Public Defender
P. O. Box 804
Yellville, AR 72687

Mr. Gordon Webb
Prosecuting Attorney
P. O. Box 483
Harrison, AR 72601-0483

Mr. Winston Pryor
200 Tower Building
323 Center Street
Little Rock AR 72201

Clerk
Supreme Court of Arkansas
625 Marshall
Little Rock AR 72201